

Environmental Protection Agency

**Thursday
February 21, 1985**

Part II

**Environmental
Protection Agency**

40 CFR Parts 23 and 100

**Judicial Review Under EPA-Administered
Statutes; Races to the Courthouse; Final
Rule**

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Parts 23 and 100**

[FRL 2752-51]

Judicial Review Under EPA-Administered Statutes; Races to the Courthouse**AGENCY:** Environmental Protection Agency (EPA)**ACTION:** Final rule.

SUMMARY: In 1980 EPA issued a rule fixing a definitely ascertainable time when Clean Water Act rules would be considered issued for purposes of judicial review. Today's final rule expands the 1980 rules to apply to some other actions under the Clean Water Act and establishes similar rules for other EPA-administered statutes, and is intended to bring greater fairness to "races to the courthouse."

EFFECTIVE DATE: This rule will be effective on April 22, 1985.

FOR FURTHER INFORMATION CONTACT: Alan W. Eckert, Office of General Counsel (LE-132A), Environmental Protection Agency, Washington, D.C. 20460, (202) 382-7606.

SUPPLEMENTARY INFORMATION:**I. Introduction**

On June 4, 1984, EPA proposed to establish a definitely ascertainable time and date of various Agency actions for purposes of judicial review. 49 FR 23152. EPA proposed that the time and date of most EPA actions reviewable in the various courts of appeals be fixed at 1:00 p.m. eastern time, fourteen days after the publication of a *Federal Register* document, or fourteen days after signature for unpublished documents. A comment period of sixty days was provided.

EPA received two comments. EPA has carefully considered these comments and has decided to issue a final rule identical to the proposed rule.

II. Basis and Purpose of the Rule**A. Experience Under the Clean Water Act Racing Rule**

The proposed rule was based on a rule published on April 17, 1980, governing the timing of issuance of Agency regulations for the purposes of judicial review under the Clean Water Act. 45 FR 26046. Under that rule, a regulation (such as an effluent limitations guideline) issued under the Clean Water Act was considered issued for purposes of direct appellate judicial review under section 509(b) of the Act at 1:00 p.m. eastern time on the date that is

two weeks after the date when notice of the action appears in the *Federal Register*.

The purpose of the 1980 rulemaking was to bring greater fairness to so-called "races to the courthouse." In these races, litigants who believe that certain courts are likely to be more receptive to their arguments than others seek by various means to be the first to be informed of an Agency action and then to be the first to file a petition for review in one of the twelve United States courts of appeals. Under 28 U.S.C. 2112(a), any subsequent petition for review in a different court of appeals must be forwarded to the court where a petition was first filed. That court may then forward all the petitions to any other court "for the convenience of the parties in the interests of justice." Of course, as the winner of the race hopes, the court may also retain all the petitions and decide the challenges. The practices of forum shopping and races to the courthouse were described in detail in the preambles to the proposed Clean Water Act racing rule, 44 FR 32006 (June 4, 1979), and to the final rule, 45 FR 26046 (April 17, 1980).

EPA's rule did not eliminate Clean Water Act races to the courthouse, but it made them fairer. By setting a definitely ascertainable time of issuance that was two weeks after the publication of the rule in the *Federal Register*, racers could assure themselves of at least a tie in the race by simply appearing at the clerk's office at the appointed time with a petition for review. The rule eliminated the walkie-talkies, human signalling chains, and open long-distance telephone lines that had characterized earlier races described in the preamble to the proposed rule.

28 U.S.C. 2112(a) provides no explicit direction to courts in resolving ties. However, when petitions for review are filed simultaneously in more than one court, courts have typically conferred among themselves to designate one court to act as the court of first filing. See *United Steelworkers v. Marshall*, 592 F.2d 693, 695 (3rd Cir. 1979) (Third and Fifth Circuits agreed to confer); *American Public Gas Ass'n v. FTC*, 555 F.2d 852, 861 (D.C. Cir. 1976) (Fifth and D.C. Circuits agreed to confer); *Virginia Electric and Power Co. v. EPA*, 610 F.2d 187, 189 n. 5 (4th Cir. 1979) (recognizing appropriateness of conference procedure).

EPA's experience with its racing rule under the Clean Water Act has been entirely satisfactory. Courts and racers alike have relied upon it to determine the priority in time of multiple petitions for review. Moreover, when EPA adopted an identical deferral

mechanism prior to issuance of the final Clean Water Act racing rule, the reviewing court upheld it unanimously. *Virginia Electric and Power Co. v. EPA*, *supra*.

B. Experience Under Other Statutes

Racing has been restricted or eliminated by Congress in enacting judicial review provisions in several other EPA-administered statutes. The Clean Air Act, the Resource Conservation and Recovery Act (RCRA), and the Safe Drinking Water Act all provide for exclusive judicial review in the D.C. Circuit of EPA's nationally-applicable regulations. These provisions eliminate a great many racing opportunities. Other statutes, however, provide racing opportunities that litigants have exploited. EPA described in the preamble to the proposed rules two racing incidents under the Uranium Mill Tailings Radiation Control Act of 1978 and the Federal Insecticide, Fungicide, and Rodenticide Act. 49 FR 23152 (June 4, 1984). These disruptive incidents provided much of the incentive for EPA to issue the rules published today.

C. EPA's Response

EPA believes that races to the courthouse disserve the public interest. They waste the time of Agency employees who must respond to the racers' continual requests for information on the status of pending actions and they frequently involve expensive, elaborate schemes to be first to file. See, e.g. 44 FR 32009 (June 4, 1979). Not only are these schemes unfair to racers with less financial resources, they are undignified parodies of the legal process with which EPA does not wish to be associated.

Accordingly, with the rules adopted today, EPA seeks to eliminate the worst abuses associated with races to the courthouse under those EPA-administered statutes that allow racing and under which races are reasonably likely to occur.

III. Response to Public Comments

EPA received two written comments, raising several issues. EPA's response to those comments follows:

A. One commenter noted that the Administrator has discretion to depart from the deferral requirements of these rules, because each provision is preceded by the words, "Unless the Administrator otherwise explicitly provides [in a particular action]." The commenter contended that this would allow the Administrator to issue a rule that is immediately effective, but with a

deferred effective date, depriving affected persons of their right to preliminary relief on judicial review.

Such an action is only a theoretical possibility. EPA recognizes that the courts would not follow the rule's deferral of the issuance date if EPA sought to make a rule or action effective prior to its issuance for judicial review purposes.

B. The same commenter observed that, under the "otherwise explicitly provides" provisions, the Administrator might make an action immediately effective. Because of this residual authority, the commenter contended, affected persons would have to prepare to race in all cases, on the chance that the Administrator might eliminate the deferral requirement.

Under the Administrative Procedure Act, codified at 5 U.S.C. 551 *et seq.*, an agency may not make a final rule effective less than 30 days after its publication in the **Federal Register**, except "for good cause found and published with the rule." 5 U.S.C. 553(d). EPA uses this authority very sparingly, and in most cases those affected by an action can rely on the customary fourteen-day delay in judicial review promulgation, and a considerably longer delay in the effective date. The authority granted by 5 U.S.C. 553(d) is reserved for cases of urgent need, and such cases inherently cannot be predicted, nor can timely notification be given to the public. Thus, although the commenter correctly notes that in these cases, a race to the courthouse could occur, EPA sees no way to prevent this in the unusual case where the public interest compels a rule to be immediately effective. In some cases, it may be possible, as the commenter suggested, for the Agency to make a rule effective only a few days after publication, and to provide a date of issuance for judicial review purposes before that date, but after publication. Such situations should be addressed individually when they arise.

C. One commenter objected to the provisions governing actions not published in the **Federal Register**. Under these rules, such actions are effective fourteen days after they are signed. The commenter objected that affected persons may have no notice of the action, and contended that the rule would deprive potential litigants of due process.

Most potential litigants interested in actions covered by the regulations will have actual notice of non-**Federal Register** documents. For example, parties in pesticide cancellation hearings and other formal hearings conducted by EPA receive mailed notice of final decisions of the Administrator.

The rule issued today will have the beneficial effect of establishing a fixed trigger for commencing the judicial review process. The commenter's concern—that someone entitled to seek judicial review, and who has no notice of the action, will later be barred from obtaining review by a preclusive judicial review provision—addresses a matter not within the scope of this rulemaking. Any such claim can be raised in judicial proceedings if it arises in practice. See, e.g., *NRDC v. EPA*, 673 F.2d 400, 407 (D.C. Cir. 1982).

IV. Section-by-Section Analysis

Section 23.2 Clean Water Act

Section 23.2, governing judicial review under the Clean Water Act, is closely modeled on the former 40 CFR Part 100 (which EPA is today revoking), which set the time of the Administrator's action for purposes of judicial review at 1:00 p.m. eastern time, two weeks after the date of publication in the **Federal Register**. However, the provision has been extended to cover EPA actions regarding state-submitted National Pollutant Discharge Elimination System (NPDES) permit programs under section 402 of the Act, and NPDES permit issuance decisions reviewable under section 509(b)(1)(F). No races have occurred under these provisions. However, these actions could be the subject of a race to the courthouse, and are not covered by the former racing rule.

Because EPA does not publish notice in the **Federal Register** of some of the actions covered by sections 509(b)(1), such as final decisions on appeals of NPDES permit actions to the Administrator, an alternative means of fixing the time of the action for purposes of judicial review has been devised. The final rule follows the former Clean Water Act rule for any action for which notice is published in the **Federal Register**. For other actions, the time and date of the action is set at the same time of day, two weeks after the date when the action is signed.

A principal purpose of the rule is to allow any potential litigant to ascertain the correct date easily from the **Federal Register** and the action documents themselves without resort to extrinsic sources. The litigant can do this simply by inspecting the action document. If in its heading the letters "FRL" appear, it is a "Federal Register document" as defined in § 23.1, and it will not be promulgated for purposes of judicial review until two weeks after it appears in the **Federal Register**. A typical heading for a **Federal Register** document might be:

40 CFR Part 425

[FRL-2411-3]

Leather Tanning and Finishing Point Source Category; Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards

Documents that EPA intends to publish in the **Federal Register** always include an "FRL-" number in brackets, sometimes accompanied by other identification codes. If a document bears no "FRL-" number, the final rules rely on the date of signature to identify the action date. EPA's standard practice is to mark all signed documents with the date of signature.

Section 23.3 Clean Air Act

Judicial review under the Clean Air Act is governed by section 307(b), which restricts judicial review of certain enumerated actions, and any others determined by the Administrator to be "of nationwide scope or effect," to the United States Court of Appeals for the District of Columbia Circuit. Actions covered by the second sentence of section 307(b), which places judicial review in the court of appeals "for the appropriate circuit," are subject to racing. These include approvals of State implementation plans (section 110), innovative technology waivers (section 111(j)), new source waivers (section 112(c)), delayed compliance orders (section 113(d)), smelter orders (section 119), and PSD applicability determinations. EPA is aware of no races that have occurred regarding actions taken under these sections. Because races are certainly possible, EPA accordingly has included such actions under the racing rules.

The rule parallels the rule described above for the Clean Water Act, except that the action date is not deferred for two weeks if notice is published in the **Federal Register**. For **Federal Register** documents, Congress has specified the date of publication in the **Federal Register** as the trigger date for judicial review. Section 307(b)(1) provides that petitions for review must be filed "within sixty days from the date notice of such promulgation, approval, or action appears in the **Federal Register**, . . ." For actions not published in the **Federal Register**, however, no such restriction applies, and EPA has deferred the trigger date until two weeks after signature.

Section 23.4 Resource Conservation and Recovery Act (RCRA)

RCRA rulemaking actions are reviewable only in the D.C. Circuit. However, Congress provided that certain EPA actions on individual RCRA

permits, and on state hazardous waste management programs, are reviewable in the court of appeals for the district in which the petitioner "resides or transacts such business." RCRA section 7006(b). Because races could occur when these actions are taken, EPA has established an action date for judicial review purposes according to the same system described above for the Clean Water Act.

Section 23.5 Toxic Substances Control Act (TSCA)

Section 19 of TSCA provides for judicial review of certain TSCA rules, and quality control orders under section 6(b)(1), in the United States Court of Appeals for the D.C. Circuit or for the circuit in which the petitioner resides or has his principal place of business. The final rule is identical in substance to the new Clean Water Act rule.

Section 23.6 Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)

FIFRA rulemaking generally is not reviewable in the courts of appeals. However, section 16(b) provides for judicial review in the court of appeals for the circuit in which the petitioner "resides or has a place of business" of "any order issued by the Administrator following a public hearing . . ." These include pesticide cancellation and suspension orders issued after a hearing. Because these orders are entered after hearings to which potential litigants will be parties, the final rule sets the trigger date at two weeks after the date of signature, even if the order is published in the **Federal Register**.

Section 23.7 Safe Drinking Water Act.

Like the Clean Air Act, the Safe Drinking Water Act provides for direct review in the courts of appeals of both rules and other determinations. Actions may be filed in the "appropriate circuit," which the statute does not define. Because the racing rule must cover both actions that are filed in the **Federal Register** and those that are not, it is the same as § 23.1, the final Clean Water Act rule.

Section 23.8 Uranium Mill Tailings Radiation Control Act (UMTRCA)

This statute provides for direct appellate review only of standards that EPA publishes as rules. Accordingly, the racing rule published today makes no provision for actions that are not published in the **Federal Register**.

Section 23.9 Atomic Energy Act

Reorganization Plan No. 3 of 1970 transferred to EPA from the Atomic

Energy Commission certain of the Commission's authority to issue rules to protect public health and the environment from radiation hazards from source, byproduct, and special nuclear material. Authority to issue these rules appears in 42 U.S.C. 2201 and judicial review of the rules is governed by 28 U.S.C. 2342 and 2343, which allow review in the court of appeals for the circuit where the petitioner resides or has its principal office, or in the D.C. Circuit.

Because EPA's authority is exercised solely through issuance of regulations, the final racing rule does not provide for review when notice is not published in the **Federal Register**. In other respects, the rule follows the Clean Water Act rule described above.

Section 23.10 Federal Food, Drug, and Cosmetic Act

Authority to set tolerances for residues of pesticides in foods was transferred by Reorganization Plan No. 3 of 1970 from the Secretary of Health, Education, and Welfare to EPA. Judicial review of certain tolerance-setting orders is governed by 21 U.S.C. 346a(i) and 348(g), which authorize the filing of a petition for review in the court of appeals for the circuit where the petitioner resides or has his principal place of business. This provision applies only when an adjudicatory hearing has been held under 21 U.S.C. 346a(d)(5) or 21 U.S.C. 348(f). The racing rule published today follows the final Clean Water Act rule, to allow for actions that may not be published in the **Federal Register**.

V. Conclusion

EPA has determined to publish its final racing rule identical to the proposed rule. These final regulations will have no significant economic impact. Their principal economic effect will be to make racing to the courthouse simple and inexpensive, so that litigants who are not well financed (such as small businesses and public interest groups) can compete equally with opponents having greater financial resources. For these reasons, the rules will not have a significant impact on a substantial number of small entities. Similarly, under Executive Order 12291, EPA must judge whether a regulation is "Major" and therefore subject to the requirement of a Regulatory Impact Analysis. This regulation is not Major because, for the reasons noted above, it should not have any significant economic impacts. This final rule imposes no record-keeping or reporting requirements.

This regulation was submitted to the Office of Management and Budget (OMB) for review as required by Executive Order 12291. Any comments from OMB to EPA and any EPA response to those comments are available for public inspection at: Room 545 West Tower, Environmental Protection Agency, 401 M Street SW., Washington, D.C.

Authority: Clean Water Act, sections 501(a), 509(b), 33 U.S.C. 1361(a), 1369(b); Clean Air Act, sections 301(a)(1), 307(b), 42 U.S.C. 7601(a)(1), 7607(b); Solid Waste Disposal Act, sections 2002(a), 7006(a), 42 U.S.C. 6912(a), 6976; Toxic Substances Control Act, section 19(a), 15 U.S.C. 2618; Federal Insecticide, Fungicide, and Rodenticide Act, sections 16(b), 25(a), 7 U.S.C. 136n(a), 136w(a); Safe Drinking Water Act, sections 1448(a)(2), 1450(a), 42 U.S.C. 300j-7(a)(2), 300j-9(a); Atomic Energy Act, sections 161, 189, 42 U.S.C. 2201, 2239; 28 U.S.C. 2343, 2344; Federal Food, Drug, and Cosmetic Act, sections 701(a), 408, 409, 21 U.S.C. 371(a), 346a, 348.

List of Subjects

40 CFR Part 23

Judicial review; Races to the Court House.

40 CFR Part 100

Administrative practice and procedure, Courts, Water pollution control.

Dated: February 12, 1985.

Lee M. Thomas,
Administrator.

1. 40 CFR Part 23 is added to read as follows:

PART 23—JUDICIAL REVIEW UNDER EPA—ADMINISTERED STATUTES

Sec.

- 23.1 Definitions.
- 23.2 Timing of Administrator's action under Clean Water Act.
- 23.3 Timing of Administrator's action under Clean Air Act.
- 23.4 Timing of Administrator's action under Resource Conservation and Recovery Act.
- 23.5 Timing of Administrator's action under Toxic Substances Control Act.
- 23.6 Timing of Administrator's action under Federal Insecticide, Fungicide and Rodenticide Act.
- 23.7 Timing of Administrator's action under Safe Drinking Water Act.
- 23.8 Timing of Administrator's action under Uranium Mill Tailings Radiation Control Act of 1978.
- 23.9 Timing of Administrator's action under the Atomic Energy Act.

- Sec.
23.10 Timing of Administrator's action under the Federal Food, Drug, and Cosmetic Act.
23.11 Holidays.

Authority: Clean Water Act, Secs. 501(a), 509(b), 33 U.S.C. 1361(a), 1369(b); Clean Air Act, secs. 301(a)(1), 307(b), 42 U.S.C. 7601(a)(1), 7607(b); Solid Waste Disposal Act, secs. 2002(a), 7006(a), 42 U.S.C. 6912(a), 6976; Toxic Substances Control Act, sec. 19(a), 15 U.S.C. 2618; Federal Insecticide, Fungicide, and Rodenticide Act, secs. 16(b), 25(a), 7 U.S.C. 136n(a), 136w(a); Safe Drinking Water Act, secs. 1448(a)(2), 1450(a), 42 U.S.C. 300j-7(a)(2), 300j-9(a); Atomic Energy Act, secs. 161, 189, 42 U.S.C. 2201, 2239; 28 U.S.C. 2343, 2344; Federal Food, Drug, and Cosmetic Act, secs. 701(a), 408, 409, 21 U.S.C. 371(a), 346a, 348.

§ 23.1 Definitions.

As used in this part, the term:
(a) "Federal Register document" means a document intended for publication in the **Federal Register** and bearing in its heading an identification code including the letters "FRL."
(b) "Administrator" means the Administrator or any official exercising authority delegated by the Administrator.

§ 23.2 Timing of Administrator's action under Clean Water Act.

Unless the Administrator otherwise explicitly provides in a particular promulgation or approval action, the time and date of the Administrator's action in promulgation (for purposes of sections 509(b)(1) (A), (C), and (E)), approving (for purposes of section 509(b)(1)(E)), making a determination (for purposes of section 509(b)(1) (B) and (D)), and issuing or denying (for purposes of section 509(b)(1)(F)) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on (a) for a **Federal Register** document, the date that is two weeks after the date when the document is published in the **Federal Register**, or (b) for any other document, two weeks after it is signed.

§ 23.3 Timing of Administrator's action under Clean Air Act.

Unless the Administrator otherwise explicitly provides in a particular promulgation, approval, or action, the time and date of such promulgation, approval or action for purposes of the second sentence of section 307(b)(1) shall be at 1:00 p.m. eastern time

(standard or daylight, as appropriate) on (a) for a **Federal Register** document, the date when the document is published in the **Federal Register**, or (b) for any other document, two weeks after it is signed.

§ 23.4 Timing of Administrator's action under Resource Conservation and Recovery Act.

Unless the Administrator otherwise explicitly provides in taking a particular action, for purposes of section 7006(b), the time and date of the Administrator's action in issuing, denying, modifying, or revoking any permit under section 3005, or in granting, denying, or withdrawing authorization or interim authorization under section 3006, shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on the date that is (a) for a **Federal Register** document, two weeks after the date when the document is published in the **Federal Register**, or (b) for any other document, two weeks after it is signed.

§ 23.5 Timing of Administrator's action under Toxic Substances Control Act.

Unless the Administrator otherwise explicitly provides in promulgating a particular rule or issuing a particular order, the time and date of the Administrator's promulgation or issuance for purposes of section 19(a)(1) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on the date that is (a) for a **Federal Register** document, two weeks after the date when the document is published in the **Federal Register**, or (b) for any other document, two weeks after it is signed.

§ 23.6 Timing of Administrator's action under Federal Insecticide, Fungicide and Rodenticide Act.

Unless the Administrator otherwise explicitly provides in a particular order, the time and date of entry of an order issued by the Administrator following a public hearing for purposes of section 16(b) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on the date that is two weeks after it is signed.

§ 23.7 Timing of Administrator's action under Safe Drinking Water Act.

Unless the Administrator otherwise explicitly provides in a particular promulgation action or determination, the time and date of the Administrator's promulgation, issuance, or determination for purposes of section 1448(a)(2) shall be at 1:00 p.m. eastern

time (standard or daylight, as appropriate) on the date that is (a) for a **Federal Register** document, two weeks after the date when the document is published in the **Federal Register** or (b) for any other document, two weeks after it is signed.

§ 23.8 Timing of Administrator's action under Uranium Mill Tailings Radiation Control Act of 1978.

Unless the Administrator otherwise explicitly provides in a particular rule, the time and date of the Administrator's promulgation for purposes of 42 U.S.C. 2022(c)(2) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on the date that is two weeks after the date when notice of promulgation is published in the **Federal Register**.

§ 23.9 Timing of Administrator's action under the Atomic Energy Act.

Unless the Administrator otherwise explicitly provides in a particular order, the time and date of the entry of an order for purposes of 28 U.S.C. 2344 shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on the date that is two weeks after the date when notice thereof is published in the **Federal Register**.

§ 23.10 Timing of Administrator's action under the Federal Food, Drug, and Cosmetic Act.

Unless the Administrator otherwise explicitly provides in a particular order, the time and date of the entry of an order issued after a public hearing for purposes of 21 U.S.C. 346a(i) or 348(g) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on the date that is (a) for a **Federal Register** document, two weeks after the date when the document is published in the **Federal Register**, or (b) for any other document, two weeks after it is signed.

§ 23.11 Holidays.

If the date determined under §§ 23.2 to 23.10 falls on a federal holiday, then the time and date of the Administrator's action shall be at 1:00 p.m. eastern time on the next day that is not a federal holiday.

PART 100—JUDICIAL REVIEW UNDER CLEAN WATER ACT [REMOVED]

2. 40 CFR Part 100 is removed.

[FR Doc. 85-3992 Filed 2-20-85; 8:45 am]

BILLING CODE 6560-50-M